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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1942**

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**No. 651**

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**DUNCAN C. McCREA,**

*Petitioner,*

*vs.*

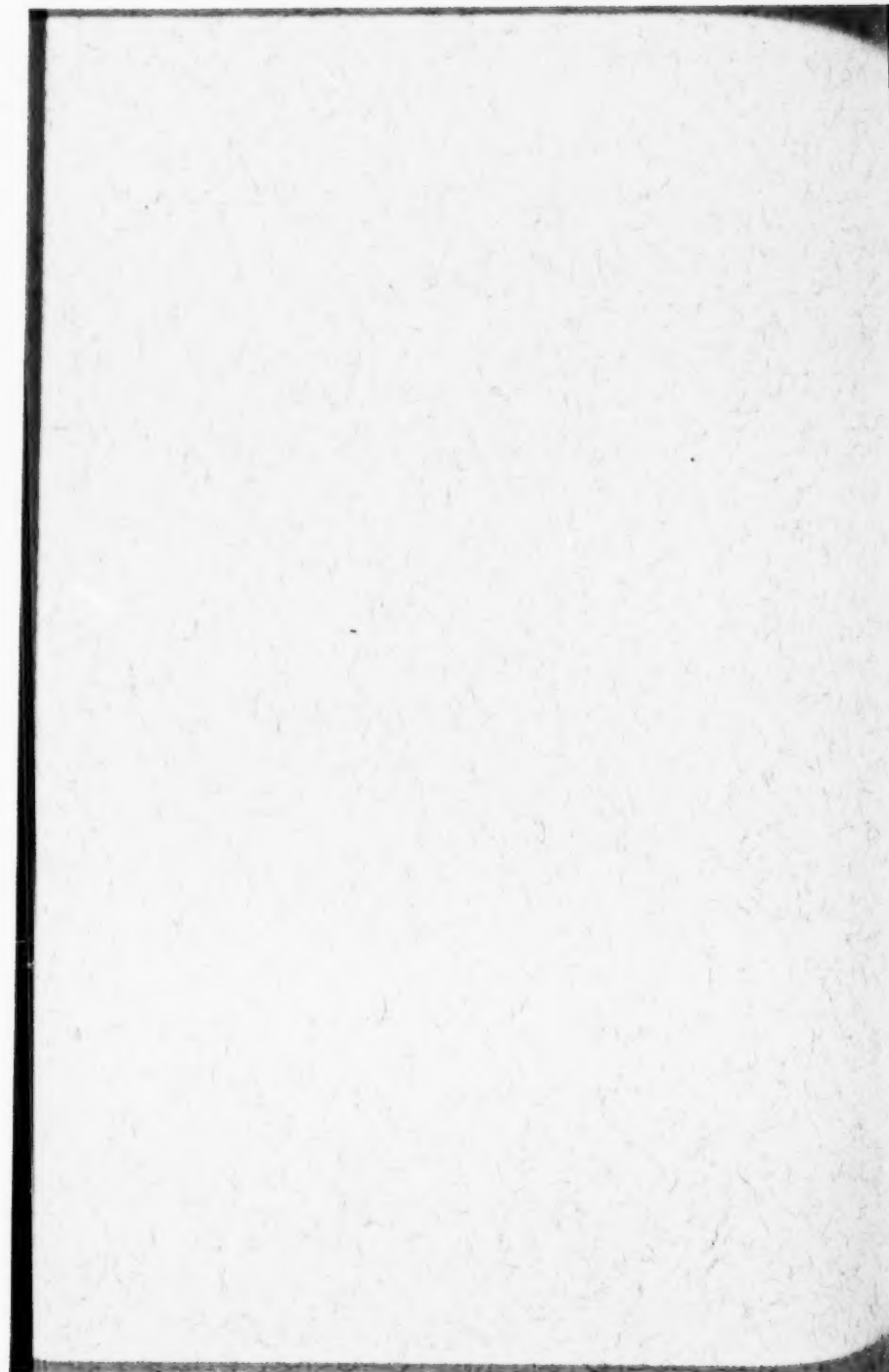
**THE PEOPLE OF THE STATE OF MICHIGAN.**

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**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MICHIGAN  
AND BRIEF IN SUPPORT THEREOF.**

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**WILLIAM E. LEAHY,  
NICHOLAS J. CHASE,**  
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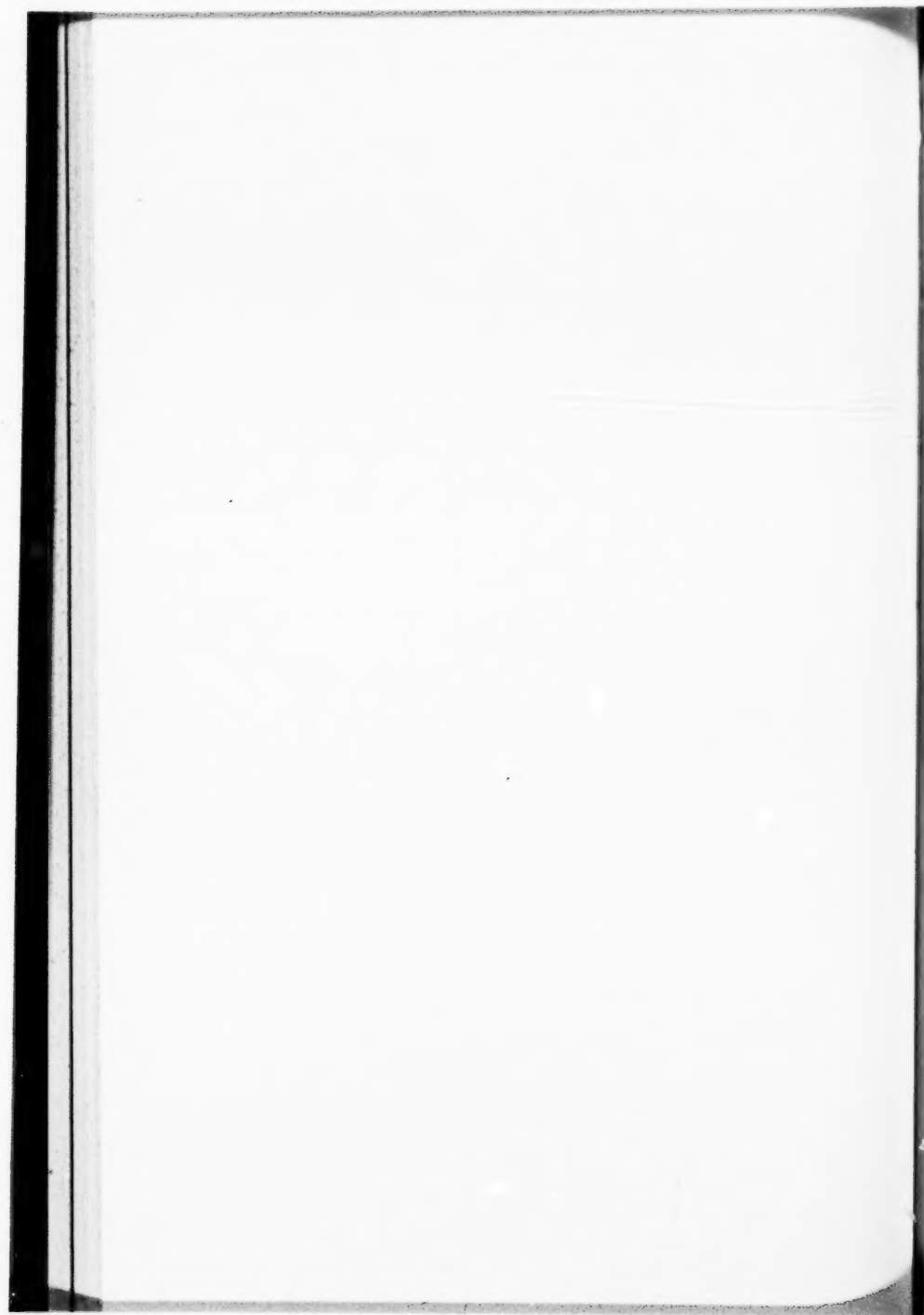
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*Petitioner,*

THE PEOPLE OF THE STATE OF MICHIGAN.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MICHIGAN.**

---

*To the Honorable, the Chief Justice and the Associate Jus-  
tices of the Supreme Court of the United States:*

Petitioner respectfully presents:

I.

**Summary Statement of Matter Involved.**

Duncan C. McCREA, the Petitioner, was prosecuting attorney of Wayne County, Michigan, from January 1, 1935 until September 13, 1940, when he was removed from office by order of the Governor of the State. In August 1939 the Circuit Judges of Wayne County granted a private citizen's petition for a grand jury investigation of alleged corruption of public officials and the taking of graft in

Wayne County, and designated Circuit Judge Homer Ferguson to act as a one-man grand jury (3 Comp. Laws Michigan, 1929, par. 17217 [Stat. Ann. par. 28.943]). As a result of the investigation made by the one-man grand jury, several informations were drawn naming Petitioner and others as defendants charging them with violation of various state statutes. Prosecution was actually instituted on an information (R. 28) charging the Petitioner and others with "a conspiracy to obstruct justice" and, after a trial extending over a three months' period, the Petitioner and other public officials were convicted on the second count of this information. The conspiracy allegedly consisted of an agreement to assist and enable the operation of various illegal enterprises in return for which the Petitioner and others allegedly received graft. Petitioner was sentenced to imprisonment for a period of four and one-half to five years, and to pay a fine of \$2,000.00 (R. 1987-8).

Petitioner appealed to the Supreme Court of the State of Michigan which affirmed the judgment and sentence. It is this judgment which is now sought to be reviewed.

During the course of the trial, the Petitioner (1) was not permitted on cross examination to lay a foundation for impeachment of witnesses, including defendants who had been granted immunity, by asking them whether they had testified differently before the one-man grand jury; (2) was forced by the one-man grand jury to claim his State privilege against self-incrimination in refusing to testify as to certain incidents which would be developed at the trial, but was penalized for claiming the privilege when the government attorney was permitted to show to the petit jury that Petitioner had stood on his constitutional rights and refused to answer; (3) was seriously prejudiced by the government in that the prosecution failed to indorse the names of *res gestae* witnesses on the information at the time of filing, although the state statute made this manda-



tory; (4) was compelled to proceed with a jury which was illegally drawn from a list of jurors of registered voters but excluded electors who were not registered voters, but who had the qualifications of jurors, although the State statute in no way contemplated the exclusion of electors who were not registered voters; (5) was seriously prejudiced in that the jury, in its deliberation, was permitted to have in the jury room three volumes of the transcript of testimony without the knowledge of the Court or defense counsel and certain exhibits with the approval of the Court but without the knowledge or consent of defense counsel; (6) was named a defendant in four warrants (indictments) wherein the one-man grand jury was the complaining witness, prosecuted on the second of these warrants, brought before the same one-man grand jury sitting as a preliminary hearing magistrate, and probable cause found notwithstanding that the same one-man grand jury had pre-judged the question of probable cause when he filed the warrant as complaining witness.

## II.

### **Basis of Jurisdiction.**

The jurisdiction of this Court is invoked under Sec. 237 (b) of the Judicial Code as amended on the ground that Petitioner has been deprived of Due Process of Law and the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The judgment to be reviewed is the judgment of the Supreme Court of the State of Michigan, entered on November 24, 1942 (R. 2138a, 2068), affirming the judgment of the Circuit Court for the County of Wayne, State of Michigan, entered on the 14th day of May, 1941 (R. 1987-1988). Motion for rehearing was submitted December 16, 1942 (R. 2068) and denied December 22, 1942 (R. 2165). A stay of

execution conditioned on filing a petition for a writ of certiorari to this Court within thirty days was granted December 22, 1942 (R. 2069).

Petitioner (Point 1) objected to the limitation of cross examination (R. 242, 361-364, 479) as being a deprivation of Federal Due Process and error was assigned (R. 10) on this ground. The Supreme Court of Michigan considered the Federal Question (R. 2093) and overruled it.

Petitioner (Point 2) objected to the disclosure before the petit jury that he, after informations were drawn, was subpoenaed before the grand jury and there relied on the state constitutional guaranty against self-incrimination (R. 1697); asserted that requiring him to answer denied him Federal Due Process (R. 1698); asked for a mistrial (R. 1702, 1738-1740); moved to strike (R. 1808); assigned error, all on the Federal ground (R. 3, 12-13). The Supreme Court of Michigan held that the conduct herein complained of was not a denial of State Due Process (R. 2131-38) but did not pass specifically on the Federal Question although Federal authorities were cited (R. 2136, 37).

Petitioner (Point 3) objected to the failure of the government attorney to indorse the names of known *res gestae* witnesses on the information at the time of filing in accordance with the established state procedure and moved to quash (R. 73, 93); error was assigned (R. 3); and the Supreme Court of the State of Michigan considered the question extensively (R. 2119-2127).

When (Point 4) the first fourteen prospective jurors had come into the jury box, Petitioner filed a written challenge to the array (R. 75, 78-81) attacking the validity of the panel because of the deliberate failure of the Wayne County Jury Commission to follow the provisions of the statute pertaining to the drawing of petit jurors for use in Wayne Circuit Court. This challenge specifically relied on the Due Process and Equal Protection clauses of the Fourteenth

Amendment to the Federal Constitution (R. 79). After trial, by supplemental motion for a new trial (R. 2029-2035) and amendment thereto (R. 2035-2041), Petitioner renewed his objection again on the Federal ground. The Supreme Court of the State of Michigan considered the Federal Question (R. 2128) and held that there was not a denial of due process (R. 2129).

After the retirement of the jury (Point 5) and during its deliberation, three volumes of testimony were handed to the jury without the knowledge and consent of either the Trial Court or defense counsel (R. 1900). Certain exhibits were given to the jury by the Court, but without the knowledge or consent of defense counsel (R. 1907). Petitioner moved for a mistrial (R. 1906). Error was assigned (R. 9). The Supreme Court of the State of Michigan considered the question (R. 2111-2119). The one-man grand jury had entered upon and completed an inquisition (Point 6) which resulted *inter alia* in the filing by him of four warrants (or "Indictments" under the state statute [25 Mich. Stat. Ann., Sec. 28.844]), naming Petitioner as the defendant. Petitioner was actually prosecuted on the second of these warrants. Under the state practice, following the filing of the warrant, Petitioner was entitled to a preliminary examination to determine probable cause. The preliminary examination was conducted by the same one-man grand jury (Hon. Homer Ferguson), who was the complaining witness on the warrant. Some time prior thereto the same one-man grand jury had instituted ouster proceedings against Petitioner herein and filed a sworn complaint against him in connection therewith with the Governor of the State of Michigan. Accordingly, when Petitioner came before the same one-man grand jury on the preliminary examination he protested vigorously, filing a written motion asserting that the investigator was not qualified to sit in judgment on the issue of probable cause. The

one-man grand jury refused to entertain such motion, supported by affidavit, and ordered it expunged from the record; consequently, it does not appear in the record below. However, two days before the commencement of trial, Petitioner renewed his objection before the Trial Court (R. 71). Petitioner asserted that the investigator, having prejudged the question of probable cause, improperly constituted himself the preliminary hearing magistrate and that Petitioner was being held for trial in a manner unknown to the law of the state and contrary to the criminal procedure and practice of the state followed in all other cases, and that, therefore, there was a denial of due process and equal protection of law in contravention of the Fourteenth Amendment to the United States Constitution (R. 70, 71). Petitioner further averred that, if the state statute permitted such a procedure, it impinged on a Federal Right in that it denied due process of law under the Fourteenth Amendment to the United States Constitution (R. 70, 71). The motion was overruled (R. 77); error was assigned (R. 2); the Court Below considered the Federal Question (R. 2097-2100), and dismissed the contention on the theory that Federal due process does not require a preliminary examination (R. 2099).

If the errors complained of herein are substantial, a violation of Federal Due Process exists.

*Lisenba v. California*, 314 U. S. 219.

*Moore v. Dempsey*, 261 U. S. 86.

*Powell v. Alabama*, 287 U. S. 45, 68.

*Baldwin v. Hale*, 1 Wall. 223, 233.

Cf. *Twining v. New Jersey*, 211 U. S. 78, 110.

*Betts v. Brady*, No. 837, Oct. Term, 1941, 86 Law. Ed. 1116, 1120.

It is respectfully submitted that petitioner has affirmatively shown that this Court has jurisdiction. See *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649.

## III.

**Questions Presented.**

1. Is it not a violation of the concept of liberty embodied in the due process clause of the Fourteenth Amendment, as affecting the adequacy of a defendant's opportunity to be heard, to cut off the right of cross examination by preventing defendant from laying a foundation for impeachment of a witness by asking him whether he testified differently when appearing before the grand jury, particularly when the witness is a co-defendant who has turned state's evidence, been cloaked with immunity, and whose testimony goes to the heart of the case?

2. Where three indictments have been returned against a defendant and the defendant is brought *under process* before a one-man grand jury, and with respect to the subject matter of the pending informations certain questions are asked by the one-man grand jury, and the one-man grand jury orders the defendant either to answer the questions, claim his immunity under a state constitutional guaranty or be given a ninety-day jail sentence for criminal contempt, and the defendant claims his privilege, is it not a violation of the guaranty of a fair and impartial trial embodied in the due process clause of the Fourteenth Amendment for the state's attorney, on the theory of testing the defendant's credibility, to disclose before the petit jury that the defendant claimed his privilege when before the grand jury?

3. Is it not a violation of the concept of *notice* embodied in the constitutional guaranty of a fair and impartial trial protected in the due process clause of the Fourteenth Amendment for the government attorney to fail deliberately to indorse *res gestae* witnesses on the information at the time of filing, in violation of a State Statute and thereby substantially prejudice and handicap the defendant at the

trial, particularly where on the *voir dire* the names of witnesses endorsed on the information are read to the panel in order to determine whether any member of the panel has had contact with any witness and, after jury chosen and sworn, this right was destroyed as to witnesses whose names were endorsed during the trial by fiat of the Court? Can this be said to guarantee a fair and impartial jury trial?

4. Is it not a violation of the fundamental right to a fair and impartial trial, as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment, where a state gives a jury trial as a matter of right, to exclude from the jury panel qualified electors who are not registered voters, notwithstanding the provisions of state law providing for the selection of the panel from all qualified electors? Can this be said to be a trial by a jury of the vicinage or by a legal jury at all?

5. Where the jury has retired to deliberate, is it not a denial of a Federal right under the due process clause of the Fourteenth Amendment guaranteeing *liberty* to the citizen for (a) the Trial Court, without authority of law or knowledge and consent of defense counsel, to submit arbitrarily exhibits to the jury; (b) the jury to be given by an officer of the *petit* jury, who received them from an officer of the *grand* jury, three volumes of the transcript of trial testimony, without the knowledge or consent of either the Trial Court or defense counsel?

6. Is it not a denial of a Federal Right for a state to grant a citizen the right to a preliminary examination and yet in that same jurisdiction have a so-called one-man grand jury, as complaining witness, return a warrant (indictment) naming a citizen as defendant and then permit, under the color of a state statute, that same one-man grand jury to sit in judgment on the issue of probable cause at the preliminary hearing? As a collateral question, are not the acts

of a state judge sitting as a so-called one-man grand jury, in denial of a Federal Right when that state official sets himself up as an inquisitor, and without regard to state constitutional or statutory law, proceeds to carry on an inquisition, bringing citizens before him under illegal process, without process, and by acts clearly constituting assault and battery, false arrest, false imprisonment and other conduct too numerous to herein enumerate?

It is submitted that alone, and particularly in the aggregate, these errors show that no fair trial within the Federal constitutional guarantee has been had.

#### IV.

##### **Reasons for the Allowance of the Writ.**

The irregularities in the trial of Petitioner clearly denied him a fair and impartial trial. No reported case has been found wherein a state judge was constituted an inquisitorial tribunal, denominated a one-man grand jury, who thereupon collected evidence without regard to law and order. The same state judge returned an indictment and then took it upon himself to sit as the magistrate at the preliminary hearing and determine the issue of probable cause on the evidence he had gathered, after he had sworn to the warrant and instituted ouster proceedings against Petitioner.

The record clearly demonstrates that qualified electors were excluded from the jury panel by the Secretary to the Jury Commission acting without authority in law or fact. The method of selecting jurors had the effect of discriminating against Petitioner because of political affiliation. Wholesale violations of the statutes controlling the selection of jurors resulted in the denial of due process and equal protection of the law as guaranteed by the Federal Constitution.

During the trial Petitioner, on cross-examination, was confronted on several occasions with the fact that he stood on his state constitutional guarantee against self-incrimination when *subpoenaed* before the one-man grand jury after the indictment was drawn upon which the prosecution below was based. The Petitioner was *forced* into claiming the privilege and thus *trapped* when the disclosure was made to the petit jury. This would appear to violate the common understanding of all men of the concept of a fair trial. No case in Anglo-American jurisprudence has been found wherein any government resorted to such a practice. It is respectfully submitted that this Court should determine the constitutional efficacy of this practice in the light of the due process clause of the Fourteenth Amendment to the United States Constitution.

We also believe, as shown in the accompanying brief, that the substantial limitation of the right of cross-examination denied the Petitioner due process of law. We respectfully submit that there was a denial of a fundamental right when the Petitioner was not permitted to lay a foundation for impeachment of witnesses by bringing out what their testimony before the one-man grand jury had been. The right to so cross-examine is vital to the defense when the witnesses are co-conspirators who have been granted immunity and turned state's evidence. This was peculiarly true under the facts set out in our brief. This Court has held that it is of the essence of a fair trial that the defense be given the opportunity to develop facts tending to discredit the testimony in chief. The question is a substantial one and it is most desirable that this Court determine whether a state may so cut off the right of cross-examination without impinging on the due process clause of the Federal Constitution. The question goes to the *adequacy of the opportunity to be heard and to defend*.



Where a state has an established procedure which requires the endorsement on the information at the time of filing of the names of *res gestae* witnesses, Petitioner was denied due process in that he was not only disadvantageously surprised but deprived of the opportunity to determine the impartiality of the jury in relation to some twenty witnesses whose names were summarily ordered to be endorsed on the information during the trial by the Trial Court. It is felt that this conduct deprived Petitioner of *notice* and went to the *adequacy of his opportunity to defend* in the light of the decisions of this Court propounding the meaning of the due process clause of the Fourteenth Amendment.

The Petitioner was given no trial at all in the constitutional sense, in that the jury received three volumes of the transcript of the testimony and certain exhibits. It is respectfully submitted that this Court should ultimately decide that Petitioner was denied a Federal Right in that the conduct of the jury, and the court officials, denied him due process of law under the Fourteenth Amendment.

Petitioner feels that he was denied his day in court under the established precedents of this Court, particularly in view of the cumulative effect of the irregularities underlying the questions herein presented in their relation to the fair and impartial trial guaranteed as a matter of Federal Right in the Fourteenth Amendment.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Michigan, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of proceedings herein; and

that the Judgment of the Supreme Court of the State of Michigan be reversed by this Honorable Court, and your Petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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